Calendar No. 959

96TH CONGRESS, 2d Session } SENATE { REPORT No. 96-874

PRIVACY PROTECTION ACT OF 1980

REPORT

together with

ADDITIONAL VIEWS

OF THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

ON

S. 1790

JULY 28 (legislative day, JUNE 12), 1980.—Ordered to be printed

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Mr. BAYH, from the Committee on the Judiciary, submitted the following

REPORT

[To accompany S. 1790]

The Committee on the Judiciary, to which was referred the bill (S. 1790) to limit governmental search and seizure of documentary materials possessed by persons engaged in first amendment activities, to provide a remedy for persons aggrieved by violations of the provisions of this Act, and for other purposes, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

TEXT OF THE BILL

Strike out all after the enacting clause and insert in lieu thereof the following:

That this Act may be cited as the "Privacy Protection Act of 1980".

TITLE I—FIRST AMENDMENT PRIVACY PROTECTION

PART A—UNLAWFUL ACTS

SEC. 101. (a) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense for which such materials are sought: *Provided, however*, That a government officer or employee may not search for or seize such materials under the provisions

of this paragraph if the offense for which such materials are sought consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under the provisions of section 793, 794, 797, or 798 of title 18, United States Code, or section 224, 225, or 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2274, 2275, 2277), or section 4 of the Subversive Activities Control Act of 1950 (50 U.S.C. 783)); or

(2) there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being.

(b) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials, other than work product materials, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) There is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense for which such materials are sought: *Provided, however,* That a government officer or employee may not search for or seize such materials under the provisions of this paragraph if the offense for which such materials are sought consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under the provisions of section 793, 794, 797, or 798 of title 18, United States Code, or section 224, 225, or 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2274, 2275, 2277), or section 4 of the Subversive Activities Control Act of 1950 (50 U.S.C. 783));

(2) there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being;

(3) there is reason to believe that the giving of notice pursuant to a subpoena duces tecum would result in the destruction, alteration, or concealment of such materials; or

(4) such materials have not been produced in response to a court order directing compliance with a subpena duces tecum, and—

(A) all appellate remedies have been exhausted; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpena would threaten the interests of justice.

(c) In the event a search warrant is sought pursuant to paragraph (4)(B) of subsection (b), the person possessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.

PART B—REMEDIES, EXCEPTIONS, AND DEFINITIONS

SEC. 105. This Act shall not impair or affect the ability of a government officer or employee, pursuant to otherwise applicable law, to conduct searches and seizures at the borders of, or at international points of, entry into the United States in order to enforce the customs laws of the United States.

SEC. 106. (a) A person aggrieved by a search for or seizure of materials in violation of this Act shall have a civil cause of action for damages for such search or seizure—

(1) against the United States, against a State which has waived its sovereign immunity under the Constitution to a claim for damages resulting from a violation of this Act, or against any other governmental unit, all of

which shall be liable for violations of this Act by their officers or employees while acting within the scope or under color of their office or employment; and

(2) against an officer or employee of a State who has violated this Act while acting within the scope or under color of his office or employment, if such State has not waived its sovereign immunity as provided in paragraph (1).

(b) It shall be a complete defense to a civil action brought under paragraph (2) of subsection (a) that the officer or employee had a reasonable good faith belief in the lawfulness of his conduct.

(c) The United States, a State, or any other governmental unit liable for violations of this Act under subsection (a)(1), may not assert as a defense to a claim arising under this Act the immunity of the officer or employee whose violation is complained of or his reasonable good faith belief in the lawfulness of his conduct, except that such a defense may be asserted if the violation complained of is that of a judicial officer.

(d) The remedy provided by subsection (a)(1) against the United States, a State, or any other governmental unit is exclusive of any other civil action or proceeding for conduct constituting a violation of this Act, against the officer or employee whose violation gave rise to the claim, or against the estate of such officer or employee.

(e) Evidence otherwise admissible in a proceeding shall not be excluded on the basis of a violation of this Act.

(f) A person having a cause of action under this section shall be entitled to recover actual damages but not less than liquidated damages of $1,000, such punitive damages as may be warranted, and such reasonable attorneys' fees and other litigation costs reasonably incurred as the court, in its discretion, may award: *Provided, however,* That the United States, a State, or any other governmental unit shall not be liable for interest prior to judgment.

(g) The Attorney General may settle a claim for damages brought against the United States under this section, and shall promulgate regulations to provide for the commencement of an administrative inquiry following a determination of a violation of this Act by an officer or employee of the United States and for the imposition of administrative sanctions against such officer or employee, if warranted.

(h) The district courts shall have original jurisdiction of all civil actions arising under this section.

SEC. 107. (a) "Documentary materials", as used in this Act, means materials upon which information is recorded, and includes, but is not limited to, written or printed material, photographs, tapes, videotapes, negatives, films, out-takes, and interview files, but does not include contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense.

(b) "Work product materials", as used in this Act, means materials, other than contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used, as the means of committing a criminal offense, and—

(1) in anticipation of communicating such materials to the public, are prepared, produced, authored, or created, whether by the person in possession of the materials or by a person other than the person in possession of the materials;

(2) are possessed for the purposes of communicating such materials to the public; and

(3) include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material.

(c) "Any other governmental unit", as used in this Act, includes the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any local government, unit of local goverment, or any unit of State government.

SEC. 108. The provisions of this title shall become effective on October 1, 1980, except that insofar as such provisions are applicable to a State or any governmental unit other than the United States, the provisions of this title shall become effective one year from the date of enactment of this Act.

TITLE II—ATTORNEY GENERAL GUIDELINES

SEC. 201. (a) The Attorney General shall, within six months of the date of enactment of this Act, issue guidelines for the procedures to be employed by any Federal officer or employee, in connection with the investigation or prosecution of a criminal offense, to obtain documentary materials in the private possession of a person when the person is not reasonably believed to be a suspect in such offense or related by blood or marriage to such a suspect, and when the materials are sought are not contraband or the fruits or instrumentalities of an offense. The Attorney General shall incorporate in such guidelines—

(1) a recognition of the personal privacy interests of the person in possession of such documentary materials;

(2) a requirement that the least intrusive method or means of obtaining such materials be used which do not substantially jeopardize the availability or usefulness of the materials sought to be obtained; and

(3) a recognition of special concern for privacy interests in cases in which a search or seizure for such domucents would intrude upon a known confidential relationship.

(b) The Attorney General shall collect and compile information on, and report annually to the Committees on the Judiciary of the Senate and the House of Represetatives on, the use of search warrants by Federal officers or employees for documentary materials described in subsection (a)(3).

(c) An issue relating to the compliance, or to the failure to comply, with guidelines issued pursuant to this section may not be litigated, and a court may not entertain such an issue as a basis for the suppression or exclusion of evidence.

Amend the title so as to read:

A bill entitled the "Privacy Protection Act of 1980."

PURPOSE OF THE AMENDMENT

The Committee bill, as amended, affords the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment. This legislation was prompted by *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978) which involved the search of a student newspaper for evidence of a crime. *Stanford Daily* held that the Fourth Amendment does not confer any special protections against search and seizure for the possessor of documentary evidence who is not himself a suspect in the offense under investigation. It further held that the First Amendment does not provide the press with any constitutional protection against police search. The Committee believes that the search warrant procedure in itself does not sufficiently protect the press and other innocent third parties and that legislation is called for. Specifically, the Committee is concerned that use of the warrant process in such cases will allow the government to invade the personal privacy of nonsuspects in instances where a less intrusive means of obtaining the material—either voluntary compliance or a subpoena will achieve the same goal.

The bill is in two titles. Title I addresses itself to protection against unannounced searches of the press and others involved in First Amendment activities. It would limit federal, state, and local government in their ability to procure search warrants to obtain work product and other documentary materials in the possession of a person engaged in the dissemination of information to the public. The Committee believes that requiring law enforcement authorities to proceed by request or subpoena first in obtaining such materials, will lessen greatly

the threat that *Stanford Daily* poses to the vigorous exercise of First Amendment rights.

Title II of S. 1790 mandates that guidelines be established by the Department of Justice to govern federal access to documentary evidence in the hands of all other nonsuspect third parties. The Committee has specified that these guidelines will require the federal government to obtain such materials through means less intrusive than a search warrant where the person is not implicated in the offense under investigation, especially when a confidential privileged relationship is involved, such as that of doctor-patient or lawyer-client.

The purpose of S. 1790 is not to interfere with the obtaining of evidence, but, rather to direct the means by which it is obtained. In this regard, the Committee believes that S. 1790 achieves a balance between the historic privacy interests of individual citizens and legitimate societal interests in investigating and prosecuting wrongdoers.

Discussion

Almost two hundred years ago, Thomas Jefferson wrote to a friend to urge the adoption of the new Bill of Rights, "The natural progress of things is for liberty to yield and government to gain ground." Perhaps with no amendment as much as the Fourth has this proposition been more evident. For the first one hundred years of the nation's history the amendment went virtually uninterpreted. It is only within the last several decades, in particular, that the Supreme Court has regularly had to wrestle with difficult Fourth Amendment issues. The 20th century advancements in technology and the increasing complexities of society have posed questions about rightful intrusions of government on citizens' privacy which have challenged judicial ability to discern the intent of the framers of the Fourth Amendment.

In May of 1978 the Court came down with a decision in *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), an opinion which leading newspapers immediately denounced as "a first step toward a police state";[1] "This assault stands on its head the history of both the First and Fourth Amendments";[2] "The privacy rights of the law-abiding were shabbily treated by the Supreme Court the other day. . . ."[3] The majority of the court held that the Fourth Amendment does not prevent law enforcement officers from making unannounced searches for documentary evidence in the possession of innocent third parties. Although the facts of the case were confined to a search of a press room, the decision was broad, extending to all nonsuspect third parties, whether doctors, lawyers, businessmen, or ordinary citizens.

In writing the majority opinion, Justice White issued an open invitation to Congress to draw statutory lines where the Constitution did not apply:

> Of course, the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses of the search warrant procedure * * *

[1] *Boston Globe*, 124 Cong. Rec. H5664 (daily ed. June 15, 1978).
[2] The *Washington Post*, June 1, 1978 at A22, Col. 1.
[3] The *New York Times*, June 6, 1978 at A16, Col. 1.

The Congress was quick to respond. Several bills were introduced in the 95th Congress, including those of Judiciary Committee members Bayh, Dole, Mathias and Thurmond. By unanimously reporting out S. 1790, the Committee has answered the Court's invitation and established procedures governing how documentary evidence should be obtained.

1. Legal history

S. 1790 must be seen in the context of the history of applicable law. At earliest common law the search warrant was unknown and entry onto another's land without permission was a trespass. The use of the search warrant grew out of property law. If he were willing to sign a sworn affidavit, an individual's chattels could be seized from another in unlawful possession. If the affidavit were incorrect, however, the individual was subject to trespass charges. Gradually, search warrants came to be allowed not only for the return of stolen property to the owner, but also for property which was deemed to belong to the Crown. Goods on which the taxes were unpaid and goods which were the fruits or instrumentalities of a crime were contraband and were subject to forfeiture to the government.

The property law concept behind the use of search warrants meant that documents or the papers were beyond search and seizure, since papers were rarely "contraband." Only a few before the drafting of the Fourth Amendment, in fact, the famous English case of *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1975) held directly that no magistrate had the power to authorize the seizure of private papers. Until what Justice Stevens in his dissenting opinion in *Zurcher* characterized as "the profound change in Fourth Amendment law" in *Warden* v. *Hayden*, 387 U.S. 294, the law in this country continued to be that police searches and seizures, were restricted to contraband and fruits or instrumentalities of a crime. Therefore during this period, unannounced searches, even with a valid warrant, were constitutionally prohibited for documents which would be useful in proving guilt, such as financial records or files or letters, since in most instances they were "mere evidence" and not intimately involved with the commission of a criminal offense or obtained by criminal acts. Consequently, a separate need to protect press and innocent third parties did not arise, since the likelihood of these parties possessing contraband or fruits of a crime was very low.

In *Boyd* v. *United States*, 116 U.S. 616 (1886), the first significant Fourth Amendment case, Justice Bradley had described searches for and seizures of goods directly related to the crime as . . . "totally different things from a search for and seizure of a man's private books and papers . . ." and stated, "It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essense of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . ." A long line of cases after *Boyd* culminating in *Gouled* v. *United States*, 255 U.S. 298 (1921) limited police searches and seizures to contraband and fruits or instrumentalities of a crime as distinguished from "mere evidence."

In Warden v. *Hayden*, the Court overruled the *Gouled* "mere evidence" rule. *Hayden* involved the chase of a suspected robber into a

house. The clothes alleged to have been worn by him in the robbery were found by police in a washing machine. The shirt was "mere evidence" with "evidential value only" under the old rule, although clearly not 'testimonial' or 'communicative' in nature. . . ." The court ruled that it was subject to seizure. In reaching this conclusion, the court abrogated the "mere evidence rule" as an evidentiary distinction unsupported by the language of the Fourth Amendment. The court was careful to limit its ruling, however, and cautioned:

> This case does not require that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.

Therefore, it was not until *Hayden* that law enforcement officers were able to search for any evidence at all unless it could be found to be fruits or instrumentalities. *Hayden* itself did not deal with documentary evidence.

Stanford Daily finally made clear that the court would not distinguish items of evidential value whose "very nature" places them out of the reach of police searches. It is the result *Zurcher* v. *Stanford Daily* that "a man's private books and papers" are as susceptible of search and seizure as bloody shirts or guns, and that it does not matter if these papers are in the possession of the criminal suspect or someone not implicated in the crime, like an attorney, doctor, journalist or neighbor.

2. The Stanford Daily decision

The facts of *Zurcher*, *Stanford Daily* was well known. On Monday, April 12, 1971, four police officers of Santa Clara County California executed a search warrant against the offices of the *Stanford Daily*, a student newspaper published at Stanford University. The police were ordered to search for and seize any photographs and negatives of a demonstration which had occurred several days before at the Stanford University Hospital. The demonstration, covered by *Stanford Daily* reporters, had resulted in violence, and several police officers had been attacked and injured by demonstrators. Subsequent articles and photographs in the newspaper convinced the local prosecutor's office that the *Daily* many have had additional photographs in its possession which could assist in identifying and prosecuting those who had assaulted the police officers. The Santa Clara County District Attorney's Office secured a warrant to search the newspaper officer. There was never any indication that the newspaper was involved in the criminal activity.

Late on Monday, April 12, 1971, Palo Alto police officers raided the *Stanford Daily* offices. The newspaper's filing cabinets, waste paper baskets, desks, and photographic laboratories were thoroughly examined. Although the police had an opportunity to read a number of notes and confidential memoranda during their search, they denied overstepping the bounds of their warrant. No additional evidence was found and the officers subsequently left.

Several *Stanford Daily* staff members subsequently filed suit under Title 42 U.S.C. Sec. 1983 alleging violations of their civil rights. Both the United States District Court and the Court of Appeals agreed with the plaintiffs that the Fourth and Fourteenth Amendments to the Constitution barred issuing warrants to search nonsuspect third par-

ties when no probable cause was shown that a subpoena duces tecum would be impractical. The United States Supreme Court, however, reversed the lower courts in a 5 to 3 decision, with Justice Brennan not participating.

Justice White, speaking for the majority, reasoned that neither the word nor the history of the Fourth Amendment required a standard for searches of nonsuspects different from that of suspects. The majority held that all that the Constitution requires is a finding of probable cause that the items to be seized are in a particular location. If the search involves a First Amendment interest, the only further protection afforded is a properly issued warrant applied with "particular exactitude." Insistence upon a subpoena, Justice White explained, would cause unnecessary delay and result in losing valuable evidence. Mr. Justice Powell, joining as the majority's fifth vote, recognized the legitimacy of innocent third parties and of First Amendment rights of the press, but concluded that issuing magistrates would adequately protect those interests from needless or overly intrusive searches.

Legislative History

Beginning on June 22, 1978, less than one month after the opinion was handed down, the Senate Judiciary Committee, Subcommittee on the Constitution, began four days of hearings on the problems associated with the *Stanford Daily* decision and several possible legislative answers. No committee action was taken in the 95th Congress, however. In April of the First Session of the 96th Congress the Administration proposed a bill to provide the protection of the subpoena-first rule to those engaged in First Amendment activities for Federal, State and local law enforcement authorities. This proposal, S. 855, was later incorporated in S. 1790 as Titles I and IV of the legislation. Title II was added in September of 1979 to afford protection against unannounced searches to those in possession of documentary materials which would be privileged in the jurisdiction in which they are to be found and Title III was designed to extend protection to all innocent third parties holding documentary evidence.

The first Senate action was taken on January 31, 1980, when the Subcommittee on the Constitution reported favorably Titles I and IV of S. 1790, providing for press protection from unannounced searches. The Subcommittee also recommended a hearing before the Judiciary Committee on the full scope of relevant legislation. That hearing was held on March 28 and dealt with legislative responses to the issue of third party protection as well as press protection. During this as well as earlier hearings, with the exception of the Department of Justice, not a single witness in favor of the legislation testified that the protections of the bill should be limited to the press alone. In fact, the representatives of new organizations were among the strongest proponents of expanding the legislation to protect all innocent third parties from arbitrary search and seizure, expressing concern about singling out the press for special treatment.

The Department of Justice, however, consistently maintained that a statute limiting searches of third parties who were not members of the press would harm law enforcement efforts. At the same time, the

Department assured the Committee that its own policy was, "Where there exists an effective alternative to a search and seizure as a means of obtaining evidence from innocent third parties such alternatives, whether in the form of a subpoena or an informal request, should be used." [4] At several points during consideration of this legislation, the Department mentioned internal guidelines as a preferable alternative to a statute. Finally, although still mindful of the threat of unrestrained searches of those not implicated in a crime, especially those like doctors and lawyers who are professionally engaged in confidential relationships, the Committee decided to proceed with a statutory proposal which would apply to federal, state and local governments, protecting those engaged in First Amendment activities, and mandating the development of guidelines for federal officials by the Department for obtaining documentary evidence from nonsuspect third parties. The Committee hopes that state legislatures will look toward S. 1790 as a model and draft their own legitimate responses to *Stanford Daily*.

On June 17, 1980, the Committee considered S. 1790 in an executive session and agreed to vote by ballot on the amendment offered in the nature of a substitute as well as several other amendments. On June 20 the poll was completed. The substitute amendment to S. 1790 was approved unanimously, all other amendments were defeated, and S. 1790, as amended, was ordered to be reported favorably to the Senate.

Section-by-Section Analysis

TITLE I. FIRST AMENDMENT PRIVACY PROTECTION

Part A. Unlawful Acts

Part A of S. 1790 provides broad protections against searches for documentary materials which are in the possession of those engaged in First Amendment activities. The Department of Justice, in drafting the legislation, rejected the idea of a "press only" bill and sought to avoid the chilling effects of disruptive searches on the ability to obtain and publish information for all those who have a purpose to disseminate information to the public. When the materials sought consist of work product, a general no-search rule applies. When the materials sought constitutte documentary materials other than work product, a subpoena-first rule is generally applicable. The title applies to state, local and federal law enforcement officers. Because disseminating information regularly affects interstate commerce, congressional authority to regulate state and local enforcement in this statute is based on the commerce clause, U.S. CONST. Art. I, Sec. 8.

Section 101. Unlawful Acts

Unlawful acts under Section 101 involve searches and seizures performed only by governmental officials, not private citizens, and conducted "in connection with the investigation or prosecution of a criminal offense." Thus, the statute does not reach searches and seizures in civil matters such as the seizure of assets to satisfy the

[4] Hearings on S. 115, S. 1790 and S. 1816 before the Senate Committee on the Judiciary, 96th Cong., 2d Sess., at 56 (1980).

payment of taxes owed by the United States on a State, nor does it apply to searches and seizures which occur in the course of foreign intelligence operations. Also outside the scope of the bill would be routine inspections by government agencies in, for example, examinations of records of regulated businesses or authorized monitoring of the purity of food and drugs.

Key to the legislation is the concept of public communication. It is this flow of information to the public which is central to the First Amendment, and which is highly vulnerable to the effects of governmental intrusiveness.

The phrase "in connection with a purpose to disseminate to the public . . . a form of public communication" reaches not only materials which are to be disseminated to the public or which contain information that is to be incorporated in a form of public communication, but also materials which are gathered in the course of preparing such a publication, yet are at some point determined to be unsuitable for publication. For example, a reporter may prepare an article which his editor decides should not be published; nonetheless, the reporter's interview notes and draft of the article would remain protected by the statute. Similarly, all of an author's research notes would be protected, although only part of the research was ultimately included in the published product.

In order to qualify for the statute's protections, the materials must be possessed in connection with a purpose of disseminating some form of public communication. Materials which are prepared or collected for other purposes, are not protected. Thus, business records or reports which are required to be filed with government agencies would not be protected, even though the public might be able to gain access to the materials through such means as a request under the Freedom of Information Act.

The term "form of public communication" is designed to have a broad meaning. The fact that a local newspaper, for example, has a small circulation does not preclude application of the statute to searches of the files of the newspaper. The internal memoranda of records of a business, however, would not constitute a form of public communication, inasmuch as they are not intended to be disseminated to members of the general public.

Section 101(a). Work product

Subsection (a) of section 101 deals with the protections afforded "work product," as defined in section 107(b). Since work product involves a creative, mental process, it was felt by the Committee that it was deserving of a higher level of protection than ordinary documentary materials. Since, however, there is a subjective quality to work product, the Committee recognized a problem for the law enforcement officer, who seeking to comply with the statute, might be uncertain whether the materials he sought were work product or nonwork product and that they were intended for publication. Therefore, in the interests of allowing for some objective measure for judgment by the office, the Committee has provided that the work product must be possessed by someone "reasonably believed" to have a purpose to communicate to the public.

Only two exceptional circumstances will allow a search warrant procedure instead of a subpoena in obtaining work product. The first is found in paragraph (1) of Section 101(a), the suspect exception. The purpose of this statute is to limit searches for materials held by persons involved in First Amendment activities who are themselves not suspected of participation in the criminal activity for which the materials are sought, and not to limit the ability of law enforcement officers to search for and seize materials held by those suspected of committing the crime under investigation. This statute recognizes this distinction, but, in light of the importance of protecting First Amendment values, it places a heavy burden on law enforcement officers wishing to invoke the suspect exception provided by this paragraph by requiring that they show probable cause to believe that the person possessing the materials has committed or is committing the criminal offense for which the materials are sought.

The suspect exception may not, however, be invoked if the only offense of which the possessor is suspected is the receipt, possession, communication, or withholding of the materials of the information contained therein.

The purpose of this provision is to prevent possible abuse by law enforcement authorities. For example, without this provision, if a reporter had knowingly received a stolen corporate report, the suspect exception could be invoked because the reporter might be said to be guilty of a crime of receipt of stolen property. To permit a search in such circumstances, in the Committee's view, might unduly broaden the suspect exception. In other words, law enforcement agents could simply charge the journalist with possession or receipt of stolen goods, generally very broad offenses, and proceed to seize the desired materials because he was a suspect in that basically contrived offense. The Department of Justice has felt this is not good law enforcement policy, and the Committee agrees that to eliminate this part of the suspect exception would chill reporters' investigations of such areas as government corruption where whistle blowers' evidence is so important.

The suspect exception is retained, however, in cases where the receipt, possession, or communication of materials constitutes an offense under the existing language of espionage laws or related statutes concerning restricted data. Because of the gravity of the offenses involved, the legal authority to search is retained where there is probable cause to believe that a violation of these federal laws has been committed. By relying on the present laws in this area rather than attempting to devise a new formulation, the Committee has sought to avoid unnecessarily burdening the First Amendment search protection proposal with complex and difficult espionage issues. It is important to remember here that these offenses involved exclusively federal matters and that there is no past history of federal searches of the media based on these statutes or any other federal laws. These laws are:

18 U.S.C. 793 Gathering, transmitting or losing defense information.

18 U.S.C. 794 Gathering or delivering defense information to aid a foreign government.

18 U.S.C. 797 Publication and sale of photographs of defense installations.

18 U.S.C. 798 Disclosure of classified information by a government employee.

42 U.S.C. 2274 Communication of Atomic Energy data to a foreign government.

42 U.S.C. 2275 Receipt of restricted Atomic Energy data.

42 U.S.C. 2277 Disclosure of restricted Atomic Energy data by an employee of United States.

50 U.S.C. 783 Communication of classified information by government officer or employee.

The Committee recognizes that there is a legal controversy over the scope of one of these statutes, 18 U.S.C. 793, concerning the espionage offense of gathering, transmitting or losing defense information. Some judicial opinions and some legal commentators have suggested that this statute could apply where there is no intent to injure the United States or give advantage to a foreign power. Other opinions suggest that the statute, like all other espionage laws, requires an intent to injure the United States. Obviously, the Committee does not attempt to settle this controversy in this bill. However, to the extent that S. 1790 provides a suspect exception related to the national security statutes which are stated, it is the intent of the Committee that with regard to 18 U.S.C. 793 the suspect exception to the ban on searches would apply only if there was an allegation of an intent to injure the United States or give advantage to a foreign power. For the purposes of this Act the government shall recognize the higher standard, the requirement of intent, before utilizing the suspect exception for searches for materials sought under 18 U.S.C. 793.

The Department of Justice has testified to the Committee that it believes that the language of S. 1790 is adequate to protect national security interests. The federal government has never employed a search warrant procedure in such cases in large part because they present a particularly sensitive policy problem. Press possession of governmental documents generally occurs when the press is critical of official policy or practice, and tensions are likely to be high. For the government to squelch such criticism by the forceful means of seizure, to which the press has no opportunity to object in advance, comes very close to forcing the issue of First Amendment freedom versus the power of the government. Broader search powers would be susceptible of abuse in chilling critical comment about the government.

The second exception, in paragraph (2), allows a lawful search warrant if there is reason to believe that the immediate seizure of the materials are necessary to prevent death or serious bodily injury. A similar use of the "reason to believe" test is found in the Right to Financial Privacy Act of 1978.

No other exceptions are provided for obtaining a search warrant for work product. There is no provision for a search warrant if a journalist threatens to conceal or destroy work product materials or if he fails to comply with a subpoena. He is, of course, subject to the normal contempt penalties which may include fines, jail and imprisonment. It was the Committee's belief that the creative process represented in work product is at the heart of First Amendment concerns and that the proper penalty for a journalist withholding his personal creation lies with the punishment of contempt. The Department of Justice, in drafting the legislation, agreed with the Committee and has further justified the work product distinction in hearings on the very practical grounds that without the protection of a no-search rule, a journalist's

work product would realistically be fair game for law enforcement investigators who could use a search warrant to piggyback their own investigation on the back of a journalist's efforts.

Section 101 (b). Documentary materials

Subsection (b) of Section 101 deals with unlawful search and seizure of documentary materials other than work product. Four exceptions apply to the general rule that search and seizure of documentary evidence in the possession of a person who has a purpose to communicate information to the public are forbidden. The first two comply with the suspect and bodily injury exceptions of Section 101 (a). In addition, paragraph (3) of section 101 (b) permits an otherwise lawful search for nonwork product documentary materials if there is reason to believe that the notice provided by a subpoena duces tecum would result in the destruction, alteration, or concealment of the materials. Among the factors which the Committee believes might be considered by a magistrate in determining whether materials might be destroyed are evidence of a close personal, family or business relationship between the person in possession of the material with a person who is a suspect; evidence of prior, similar conduct by a party who may exert control of the material; or evidence that a party in possession of the material has expressed an intent to hide, move, or destroy the material sought.

Paragraph 4 deals with failure to comply with a subpoena duces tecum. This paragraph provides that if, after a proceeding resulting in a court order directing compliance with a subpoena duces tecum, the possessor of the materials still refuses to produce the materials sought, a search warrant may be obtained if either all appellate remedies have been exhausted, or there is reason to believe that the delay occasioned by further proceedings regarding the subpoena would threaten the interests of justice.

The Committee believes that the factors the court shall consider in determining the interests of justice include but are not limited to: the immediacy of the need for the documentary materials sought; the importance of the documentary materials to the government's case; the severity of the offense; the interests in providing full appellate remedies; and the privacy interests sought to be protected by this Act.

If a warrant is sought prior to the exhaustion of all appellate remedies upon a showing of a threat to the interests of justice, the person possessing the materials must be given an opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure. The affiant could assert that the materials were "work product" and thus not obtainable under this paragraph, that the interest of justice would not be threatened by his further pursuit of appellate remedies, or that, in any event, there was not the requisite probable cause to obtain a warrant.

Part B. Remedies, Exceptions, and Definitions

Section 105. Inapplicability to searches and seizure conducted to enforce the customs laws of the United States

Section 105 states that the limitations on governmental search and seizure provided by this statute are not to apply to searches at the borders of or at international points of entry into the United States

pursuant to the enforcement of the customs laws of the United States. These searches are generally of a routine, nonintrusive nature and are designed to prohibit the introduction of contraband or unlawful materials into the United States, and to facilitate the assessment and collection of duties and tariffs.

Section 102. Remedies

Section 106 (a) Civil action.—Subsection (a) of Section 106 provides for a civil cause of action for damages for violations of the Act. Such an action may be brought by any person aggrieved by a violation of the statute.

Paragraph 1 deals with liability of government units. When a government officer or employee has violated this statute while acting within the scope or under color of his office or employment, the government employing the officer shall be liable for such violations, except in those cases in which the officer or employee is employed by a State which has not waived its immunity under the Eleventh Amendment of the Constitution. The remedy against the government unit in such cases is exclusive. The plaintiff may not recover from both the government and the officer. The exclusivity of the remedy against the government is specifically stated in subsection 5 (c).

Paragraph 2 covers liability of state officers. Because of the uncertainty of the question of whether or not a statute enacted pursuant to the commerce clause can override the Eleventh Amendment immunity, this subsection provides that when a violation of this statute is committed by an officer or employee of a state which has not waived such immunity under the Constitution, the officer shall be personally liable for the violation.

It is noted that this statute does not provide a remedy for violations committed by officers, whether state, federal, or local, whose actions are not within the scope of and not under color of their office or employment. In such cases the officers would be acting solely as private citizens, and relief would have to be scught under existing law.

It is not the intent of this proposed legislation to expand current law concerning which persons have standing to bring an action for an unlawful search or seizure. Thus, if materials are seized in violation of this statute, it would be the person in possession of the materials, and not the party to whom the information related—the criminal suspect—who would have standing to bring an action under these provisions. The goal of the statute is to protect innocent third parties in possession of documents and papers from governmental instrustions which would unnecessarily subject their files and papers to search and seizure. Consequently, it is these persons who may avail themselves of the remedy provided by the statute.

Section 106 (c). Limitation of defenses

If a government unit is liable under paragraph 1 for a violation of this statute committed by one of its officers or employees, it may not assert as a defense to the action brought against it the immunity of the officer committing the offense (whether that immunity is derived from a statute or the common law) *or* the good faith belief of the officer in the lawfulness of his conduct. The traditional doctrine of judicial immunity, however, is preserved and available to the government entity.

In the past, the good faith defense has often precluded the recovery for unlawful searches and seizures. Prohibiting the use of this defense when the government unit is the defendant in a suit brought under this statute is not only a fair means of assuring compensation for damages resulting from unlawful governmental searches, it will also enhance the deterrent effect of the statute.

Individuals sued under (2), however, may claim that they had a reasonable good faith defense in the lawfulness of his conduct.

Section 106(d). Exclusivity of remedy against a governmental unit

The subsection provides that the remedy against a government unit which is provided by subsection (a)(1) is exclusive of any action against the offending officer for the same violation of the Act. However, this section does not preclude the plaintiff from bringing a claim against the officer for wrongful acts other than a violation of the statute which occur in the same course of events. Thus, even though the government unit is liable for damages for a violation of this statute, the plaintiff could, for example, proceed against the officer for trespass, destruction of property, or a violation of civil rights.

Section 106(e). Unavailability of the exclusionary rule

This subsection provides that materials obtained as a result of a violation of this act will not be excluded in any other proceeding solely because of violation of this statute. Of course, the material may be determined to be inadmissible in such a proceeding if a ground independent of the violation of this statute is found. The Committee understands that defendants can only claim the benefits of the exclusionary rule if their own Fourth Amendment rights are violated. However, the Committee is sensitive to the danger which would be posed should the government ever turn the standing rule for assertion of the exclusionary rule "into a sword to be used by the government to permit it deliberately to invade one person's Fourth Amendment right in order to obtain evidence against another person," as the dissenters in the recent case of *United States* v. *Payner* ——— U.S. ——— (1980) feared. The Committee expects that the Department of Justice and state and local law enforcement authorities will not allow the provisions regarding exclusion of evidence in S. 1790 to be manipulated in bad faith by their officers and agents.

Section 106(e). Damages

This subsection provides that a plaintiff bringing an action under Section 106 of the statute may recover actual damages resulting from a violation of the provisions of the Act, but that in any event he is entitled to recover liquidated damages of not less than $1,000. The provision for a minimum amount of liquidated damages is essential because it often will be difficult for a plaintiff to show more than nominal or actual damages.

Punitive damages may also be awarded if warranted, as well as attorneys' fees and litigation costs. Since governmental units are exclusively liable for violations which occur when the officer is acting solely under color of office, and these are the instances in which awards of punitive damages are most likely to be warranted, it is appropriate

that the governmental unit be liable for punitive damages. Governmental defendants are thus liable to the same extent as individual defendants, except that they are not liable for interest prior to judgment.

Section 106(f). Settlement of claims against the United States and commencement of administrative proceedings against officers of the United States violating this Act

The purpose of subsection (f) is twofold. First, it simply gives the Attorney General the authority to settle claims for damages brought against the United States under the provisions of the statute. Second, it requires the Attorney General to promulgate regulations to provide for the commencement of an administrative inquiry if it is determined that an officer of the United States has violated the Act, and to provide for the imposition of administrative sanctions if they are warranted.

Section 106(g). Jurisdiction in the district courts

This section provides that the district courts of the United States shall have jurisdiction to hear civil causes of action for violations of this statute. This provision is designed to overcome the $10,000 amount in controversy requirement of 23 U.S.C. 1331 (which provides jurisdiction over causes of action arising under the laws of the United States) which applies when suing a party other than the United States or an officer or employee of the United States in his official capacity.

Section 107. Definitions

Section 107(a). Documentary Materials.—"Documentary materials," as defined in Subsection (a) of section 107 encompasses the variety of materials upon which information is recorded. Included within the definition are not only written and printed materials such as reports, records, and interviews, but also films, photographs, tape recordings, and videotapes. Not included in this definition are contraband or the direct fruits of the crime, or the things or property designed or intended for use in the offense, or have been used as a means of committing the offense. These traditional categories of things which are properly subjects for search are in a vast majority of instances not documentary materials, but rather money, guns, weapons, narcotics, etc. The phrase "the things or property designed or intended for use in the offense" is derived from the U.S. Attorneys' Manual defining those objects which are subject to search under present law. The Committee felt that in the rare instances where documentary materials were contraband or the fruits of a crime, they should be available by search procedure to law enforcement authorities as they were pre-*Hayden*.

S. 1790 makes documentary materials the subject for protection from search and seizure for several reasons, all of them with historical roots. First, personal papers have been singled out for special protections throughout our legal history because courts beginning with *Entick* v. *Carrington* have perceived their special significance to privacy interests. As the Court said in *Boyd*, it is not simply "the rummaging of his drawers" that is offensive to the person searched; there is also the matter of "personal security personal liberty and private

property." A search for papers almost invariably entails rummaging, however, and thus constitutes a further invasion of privacy. The process of a search through files presents the opportunity for the police officer to view a great deal of material extraneous to the warrant.

Secondly, documentary materials convey information. The majority in *Hayden* was willing to erase the "mere evidence" rule on the seizure of a robber's clothes, but was careful to note that the shirt was "clearly not 'testimonial' or 'communicative' in nature, . . ." The "communicative" nature of papers brings both Fifth and First amendment consideration into play, and makes them a very different object for search and seizure than weapons, narcotics, or bloody shirts. In addition, documentary materials are generally sought from journalists and others for their informational value in a criminal investigation. Therefore, there is a practical risk that police officers may use search procedures as an easy way to obtain information from a newsman or journalist which could have been developed through their own investigations.

Section 107(b). Work Product.—"Work product" as defined in subsection (b) of Section 107 encompasses the materials whose very creation arises out of a purpose to convey information to the public. They may be created by the person in possession of the materials, or by another person in anticipation of public communication. Thus, for example, financial records of a business which are held by a member of the press are not work product inasmuch as they are not created in connection with plans "to communicate to the public". However, a report prepared by a member of the press based on those financial records would constitute work product, as would such a report prepared by a whistle-blower who intended that the contents of the report be made public.

In an effort to more fully define and describe work product as used in this Act, in paragraph 3 of section 107(b), the Committee has borrowed language from Rule 26(b)(3) of the Federal Rules of Procedure, "General Provisions Governing Discovery" regarding the work product of attorneys, which emphasizes the mental processes employed by the person creating such material.

Work product does not include contraband or the fruits of a crime. These kinds of evidence are so intimately related to the commission of a crime, and so often essential to securing a conviction, that they should be available for law enforcement purposes, and, therefore, must fall outside the no search rule that is applied to work product. It would be rare for contraband, or the fruits of a crime to meet the definition of work product, since they generally would not be created for the purpose of communicating to the public. One example would be a ransom demand sent by a kidnapper to a newspaper for publication.

Section 107(c). Government Unit.—Subsection (c) defines "any other governmental unit" as including the District of Columbia, Puerto Rico, any United States territory or possession, and any local or state government or governmental unit.

Section 108. Date of Enactment

Section 108 provides that this Act would become effective for the federal government on October 1, 1980, or fiscal year 1981, to avoid any possible violation of Section 402(a) of the Budget Act. For state

and other governmental units, the Committee has provided one year from date of enactment for the provisions of the Act to become effective, so that state and local governments will have sufficient time to make any necessary procedural changes in their laws to comply with S. 1790.

TITLE II. ATTORNEY GENERAL GUIDELINES

Section 201. Development of Guidelines

After hearings on S. 1790 and predecessor legislation, the Committee felt strongly that some sort of protection against unannounced searches of nonsuspect third parties was needed. Enough instances of searches of doctors' and lawyers' offices have occurred around the country since *Stanford Daily* to substantiate fears of abuse of third party searches. As originally drafted, S. 1790 supplied such statutory protections from actions by state, local and federal government authorities. Serious constitutional and policy questions about congressional authority to impose law enforcement procedures on the states remained unresolved, however. While emphasizing that the policy of the federal government was one of seeking effective alternatives to searches of third parties, the Department of Justice opposed any statutory approach to articulating this policy on the grounds that the inflexibility of a statute might prove to be detrimental to law enforcement efforts, particularly in the areas of white collar and organized crime. The Department also pointed to an absence of evidence of abusive third party searches by federal law enforcement officers. The Committee therefore has proposed and the Department has agreed to a legislative mandate that the Department develop guidelines which will be based on the overall philosophy of this legislation.

The invasion of personal privacy resulting from an unannounced search of non-suspect third parties requires stringent measures to limit the circumstances under which such searches can be conducted. It is the intent of the Committee that the guidelines promulgated by the Attorney General should reflect these concerns. Upper-level Department of Justice approval of a request for a search warrant and specifications of internal procedures for disciplining those who violate the standards of the guidelines are examples of the type of protections that should be included in the guidelines.

In addition, the Committee is aware of the effort which many individuals and groups have made to help develop standards within this legislation that both meet the needs of effective law enforcement and protect the privacy of innocent individuals. It is hoped by the Committee that the Attorney General will consult those members of academia, the public interest bar, clergy and mental health professionals and other citizen groups before developing guidelines in this area. The choices and methods involved in these consultations would of course be at the discretion of the Attorney General. Subsection (a) of section 201 directs the Attorney General to complete these guidelines within six months of enactment of the Act.

Three standards are established which must be incorporated in the development of the guidelines. Paragraph 1 of section 201(a) mandates a recognition of the personal privacy interests of the person

possessing the materials sought. Paragraph 2 requires that the least intrusive means of obtaining the materials be employed which do not substantially jeopardize the availability or usefulness of the materials sought. The Committee expects these two standards to be translated into guidelines which will require an informal request or a subpoena wherever there is an opportunity for an effective alternative to search and seizure. The Committee also anticipates that the exceptions to this general rule in the guidelines will parallel those provided in the legislation. In other words, the principal exception which would allow the use of a search warrant as opposed to a request or a subpoena is where there is sufficient reason to believe that the documentary materials sought would be destroyed if a subpoena were to be issued. Destruction of evidentary materials would be most likely to occur in those cases where a close, sympathetic between the possessor of the materials and the suspect exists, or where the suspect holds some form of dominance over the possessor. This type of close relationship is most frequently found in marital or family settings, and therefore, establishes the basis for the exclusion of those "related by blood or marriage to such a suspect" from the protections of the guidelines. However, it is not in the intent of the legislation to exclude from its protection family members who do not have this kind of demonstrable close relationship with the suspect.

The third standard to be incorporated in guidelines as provided in paragraph 3 is a recognition of special concern for the privacy interests represented in a known, professional, confidential relationship, such as doctor-patient, attorney-client, or priest-penitent. Testimony on *Stanford Daily* legislation before the Committee convinced the members of the extreme sensitivity of the relationship, for example, between a psychiatrist and his or her patient, and the harm which can be done by an intrusive governmental seizure of confidential information, and police rummaging through confidential files.

The searches of those in privileged relationships which have been brought to the Committee's attention have all been executed at the state or local level. The Committee has been struck by the lack of definitive, federal data available in this sensitive area, however, and therefore in subsection (b) of section 201 has required the Attorney General to collect and compile information on the use of search warrants by federal officers or employees for documentary materials in the possession of those in professionally confidential relationships. These data are to be reported annually to the Judiciary Committees of the House and Senate acting in their oversight capacity over the Department.

Section 201(c). Nonlitigability of guidelines

Subsection (c) of section 201 provides that noncompliance with guidelines would not be litigable, and that evidence obtained through a violation of guidelines would not be subject to the exclusionary rule, and that the federal courts would be without jurisdiction over any claim based solely on a failure to follow such guidelines.

Non-litigability provisions similar to subsection 201(c) are found in section 205 of S. 1722, the proposed revision of the federal criminal code, which sets forth factors to be considered in the exercise of

concurrent federal jurisdiction, and in section 537a of S. 1612, the proposed FBI charter legislation.

Absent explicit language, it is arguable that judicial review of the adequacy of guidelines would be available under section 704 of the Administrative Procedures Act, 5 U.S.C. § 704. However, the well-established "presumption of reviewability" of *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967) is subject to an exception under section 701(a) of the APA, i.e., where the "statute precludes judicial review". Of course, the longstanding rule will continue to apply that "an executive agency must be rigorously held to the standards by which it professes to be judged." *Vitarelli* v. *Seaton*, 359 U.S. 535 (1959) (Frankfurter, Jr., concurring). Under this rule, courts are obliged to bind administrative agencies to their internal regulations and guidelines.

Whether the exclusionary rule could be invoked absent the language of subsection (c) is debatable. The Supreme Court in *United States* v. *Caceres*, 440 U.S. 741 (1978) did not resolve the issue of whether the violation of regulations gives rise to the application of the exclusionary rule. Dicta in *Caceres* might be interpreted to allow exclusion of evidence if the violation of guidelines rises to the level of a statutory violation, but whether a defendant would have the requisite standing to invoke the rule for such a violation in the search of a third party without an explicit congressional authorization remains highly doubtful. In any case, the explicit language of subsection (c) forecloses such a possibility.

It was the position of the Department of Justice, in which the Committee concurred, that guidelines should not create the opportunity for litigation which would be both burdensome and unnecessary to achieve the purposes of the guidelines. Title II of S. 1790 will assure that the present practices of restraint by federal officers in the area of third party searches becomes an articulated Departmental policy, binding on all federal law enforcement officers. The Committee expects that under the guidelines any officer who violates the guidelines will be subject to disciplinary action by the Department, and that the Department will enforce the guidelines fully in good faith compliance with the policy toward third party searches that they express, subject only to the kind of judicial review contemplated in *Vitarelli* v. *Seaton*.

In general terms, of course, oversight of the Department of Justice is the responsibility of the Committee on the Judiciary. The budget authorization process and the regular activities of the Committee will permit oversight of the Department's adherence to the provisions of S. 1790. In particular, the guidelines mandated by Title II of S. 1790 in connection with third party searches shall be subject to Committee scrutiny by virtue of its oversight responsibilities.

Cost Estimate

It is estimated that there will be no additional costs to the United States due to the provisions of S. 1790.

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, D.C., June 25, 1980.

Hon. EDWARD M. KENNEDY,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1790, the Privacy Protection Act of 1980, as ordered reported by the Senate Committee on the Judiciary, June 20, 1980.

The bill amends current law to make it unlawful for government officials to search for or seize materials possessed by news or publication organizations. If enacted, this bill would require government agents to obtain subpoenas rather than search warrants for materials. The bill also provides various exceptions to the prohibitions against surprise searches and seizures. Based on information from the Department of Justice and the Administrative Office of the United States Courts, it is estimated that there will be no significant additional cost as a result of these changes in procedure.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

REGULATORY IMPACT

In compliance with paragraph 5, Rule of the Standing Rules of the Senate, the Committee has conducted that the bill will have little or direct regulatory impact.

COMMITTEE ACTION

The Committee motion to report to the Senate S. 1790, as amended, carried unanimously.

ADDITIONAL VIEWS OF SENATORS ORRIN HATCH AND ALAN SIMPSON

I. INTRODUCTION

Each of us has supported S. 1790, the Privacy Protection Act, in both subcommittee and the full Judiciary Committee. We recognize the unique needs of the journalism profession, and the unique role that the press is accorded in our constitutional framework. Each of us, too, is committed to the principle that the Government ought to employ the least intrusive, practicable means to secure information that is necessary for criminal proceedings, not only with respect to journalists, but with respect to all individuals.

The fourth amendment to the Constitution establishes the basic standard that searches and seizures must not be "unreasonable". As Justice Powell noted in his concurring opinion in *Zurcher* v. *Stanford Daily*:

> The magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case * * *. A magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the first amendment.

The *Stanford Daily* case held that the Constitution does not require a magistrate to conclude that warrant searches of the press are necessarily "unreasonable". The committee in adopting S. 1790 is, in effect, instructing magistrates and others empowered to issue warrants that a search directed at the documentary materials of journalists is to be considered in itself "unreasonable" in the absence of certain enumerated circumstances. For this reason, a 'subpoena-first' rule is established with respect to most documentary materials in the possession of journalists. In adopting S. 1790, the committee is establishing protections for journalists that are permitted, but not required, by the Constitution.

II. DEPARTURE FROM 'SUBPOENA-FIRST' RULE

One of our two major concerns with the final committee product is its departure from a mere 'subpoena-first' rule with respect to a journalist's "work product". The bill instead adopts a rule that may absolutely prevent material from being secured for use at trial. In contrast to other documentary materials, "work product" materials cannot be obtained through warrants even (1) when there is reason to believe that the giving of notice pursuant to a subpoena would result in the destruction, alteration, or concealment of evidence; or (2) when a subpoena has already been disobeyed and all appellate remedies have been exhausted.

The *Stanford Daily* case underscores the potential for abuse under this approach. There, the newspaper had announced a policy of destroying any photographs in their possession that might aid in the prosecution of a group of protestors who had attacked and injured nine policemen. At oral argument before the U.S. Supreme Court, the counsel for the newspaper participated in the following exchange with several of the justices:

> *Question.* Let us assume you had a picture of the commission of a crime. For example, in banks they take pictures regularly of, not only of robbery but of murder committed in a bank and there have been pictures taken of the actual pulling of the trigger or the pointing of the gun and pulling of the trigger. There is a very famous one related to the assassination of President Kennedy.
>
> What would the policy of the *Stanford Daily* be with respect to that? Would it feel free to destroy it at any time before a subpoena had been served?
>
> Mr. FALK. The—literally read, the policy of the Daily requires me to give an affirmative answer. I find it hard to believe that in an example such as that, that the policy would have been carried out. It was not addressed to a picture of that kind or in that context.
>
> *Question.* Well, I am sure you were right. I was just getting to the scope of your theory.
>
> Mr. FALK. Our——
>
> *Question.* What is the difference between the pictures Justice Powell described and the pictures they were thought to have?
>
> Mr. FALK. Well, it simply is a distinction that——
>
> *Question.* Attacking police officers instead of the President. That is the only difference.

Under S. 1790, as reported, such materials in the possession of a newspaper like the Stanford Daily would be totally unobtainable by the Government. The sixth amendment rights of individuals to a fair trial, and the interests of society in having its laws enforced, may well be compromised by a policy that makes these materials wholly inaccessible for the criminal justice process.

The only recourse against a journalist who refuses to comply with a subpoena for his "work-product" is contempt of court. The argument that the contempt sanction is an adequate remedy is not persuasive. While a contempt citation may punish an individual, it establishes no control over the sought-after information; it does not secure the information needed for the criminal trial or investigation. Further, even when contempt sanctions are ultimately successful in inducing individuals to comply with subpoenas, the delay involved may seriously inhibit or block an investigation.

The lack of a destruction of evidence exception for "work-product" is particularly regrettable in that it can only serve to benefit the few highly irresponsible members of the journalism profession who seek to withhold evidence from the criminal justice system. The overwhelming preponderance of press in this country are not likely to destroy evi-

dence or refuse to cooperate with law enforcement officials. Documentary materials in their possession would normally be available through subpoenas. These journalists have no need to be afforded any enhanced protections since there would be no "reason to believe" that they would destroy, alter or conceal documents. It is only the irresponsible press which will have the opportunity to seize upon the absolutist protections in S. 1790.

There is no precedent for a policy that would place in the hands of private individuals the determination whether or not materials needed in a criminal trial or investigation are to be made available to the courts.

It must be emphasized that S. 1790 is not a "shield" law; it does not protect sources or informants. The greatest protection is given to "work product" materials which by definition must be intended for public dissemination. Other documentary materials may be obtained through warrant searches under circumstances described above. Even if a subpoena is used, however, the "shield" law issue remains; in the absence of specific legislation, the journalist must supply the desired materials intact (including the name of the source, if that is part of a requested document) or face punishment for contempt. S. 1790 does not change this.

III. "WORK-PRODUCT" VERSUS "NON-WORK-PRODUCT"

It is worth emphasizing also that it is not the "privacy" interests of the journalist that justify his preferred treatment under S. 1790. For example, personal diaries of the journalist, like anyone else, are not immune from warrant searches. Rather, it is his first amendment-related activity of disseminating information that is accorded unique protections. Yet, nothing stemming from the first amendment would justify the distinction between "work-product" and "non-work-product". The basis for exceptional treatment is the journalist's intention to disseminate information to the public, not his creativeness, or the amount of energy he has exerted, in developing materials.

We believe the "work-product"—"non-work-product" distinction may well prove to be an unworkable burden for the average magistrate or policeman-on-the-street. He will have to engage in some remarkably rapid and sophisticated analysis in order to determine what materials are obtainable through warrants, under what circumstances, and subject to what exceptions. He himself may have to engage in a form of "mind-reading" in order to decide such matters as whether or not documentary materials are possessed "in anticipation of communicating such materials to the public".

IV. NATIONAL SECURITY

Our second major concern arises because the bill as reported does not contain an adequate national security exception.

As S. 1790 is now drafted, documentary materials needed for an investigation or prosecution of serious crimes involving the national security, including treason, sabotage, and espionage, would not be subject to a warrant search, even if there were probable cause to believe that the delay or notice involved in the use of a subpoena would substantially reduce the availability or usefulness of the evidence. This would

be true regardless of how serious was the threat to national security of the criminal actions being investigated, with certain very limited exceptions.

The national security exception now provided in the bill would only cover situations where the custodian of the needed documentary materials was himself suspected of the crime being investigated. In most investigations, therefore, a search warrant could be used only if one of the other very narrow exceptions were available. These exceptions are not adequate to cover all potential national security needs. For "work-product," as we stated earlier, an exception allowing use of a search warrant would not be available even if there were reasons to believe that the giving of notice pursuant to a subpoena would result in the destruction, alteration or concealment of the needed materials. Furthermore, the use of a subpoena involves other risks besides that of giving notice. In a critical national security investigation the delay involved in the subpoena procedure, even if the subpoena is obeyed, may well lead to crucially needed documentary materials being obtained too late.

S. 1790 as reported does not reflect the high priority given to national security in other legislation. Wiretap provisions—of both existing law and the proposed Criminal Code reform bill reported by the Judiciary Committee—recognize that the needs of national security can sometimes make reasonable what would otherwise be unreasonable, namely an invasion of the privacy interests of Americans even without prior judicial authorization.

It is worth emphasizing that in this bill we are not dealing with judicially unauthorized searches, or with a statute that pushes government power toward the limit of what the Constitution permits. S. 1790 does the opposite—it provides that government pull back from that Constitutional limit, restricting even Constitutionally proper warrant searches. We are in effect saying that, especially when communication to the public is involved, subpoenas should be used except in certain very limited circumstances.

The press and other persons disseminating information and opinion to the public are not exempt from the wiretap statutes. The national security provisions which apply to everyone else apply to them as well. It is even less appropriate that they be exempt from searches authorized by warrant when important national security interests are at stake, when the criminal activity being investigated consists of treason, sabotage, or espionage.

We find it difficult to understand how when the security of our nation is at stake, the press or any person with documentary materials necessary to an investigation of these serious offenses should be immune from Constitutionally proper warrant searches. In our view when the delay and the notice inherent in the subpoena procedure would jeopardize the availability or usefulness of materials needed for such an investigation, a warrant search should be available.

The fact that the Federal Government has never searched the press for national security materials does not mean that the need may not arise in the future. Since the government has the authority to conduct such searches now, the fact that it has never found it necessary

to do so makes it likely that in the future such searches would be very rare or non-existent. That is certainly our intent.

It has been claimed that the instances in which needed national security information would be considered "work product" would be "extremely rare" and that for documentary materials which are not "work product," the destruction of evidence exception would be available. The claim that needed materials would seldom be "work product," even if true, would not be very comforting when those "extremely rare" instances occurred. Furthermore, as we have already stated, even for "non-work product" materials, the existing exceptions do not adequately cover the risk of delay.

V. LAW ENFORCEMENT POSITION

Finally, we note that Justice Department and F.B.I. officials have not publicly requested a destruction of evidence exception for "work product" or a broader national security exception. This does not surprise us since the relevant part of S. 1790, Title I, was drafted by the Justice Department and proposed as the official position of the Administration, to which particular representatives would not be in a position to object. Law enforcement officials not subject to the same political constraints, for example the National District Attorneys Association, have expressed support for amendments in both these areas.

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